Office - Supreme Court, U.S.
FILED
MAY 9 1958
JOHN T. FEY, Clerk

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 946

DULIEN STEEL PRODUCTS, INC.
Petitioner

vs.

ELBERT B. CONNELL,
Respondent

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHILIP H. MECOM
LEROY H. SCOTT, JR.
GEORGE J. DESPOT
H. DAN SAWYER
302 Ricou-Brewster Building
Shreveport, Louisiana
Attorneys for Respondent

OF COUNSEL
MECOM, SCOTT & DESPOT
302 Ricou-Brewster Building
Shreveport, Louisiana

LECOMTE, SHREVEPORT, LOUISIANA

INDEX

Opinions Below 1

Jurisdiction 2

Statute Involved 3

Question Presented 4

Statement of the Case 5

Argument ..... 8 - 17

- Jurisdiction 8
- Applicable State Law 12
- Relief Sought Already Denied 13
- Waiver of Rights for Certiorari 13
- Other Reason ity, Res Judicata, etc. 14
- Damages to Respondent 15

Conclusion 17

CITATIONS

Amalgamated Clothing Workers vs. Richmond Brothers, 348 U. S. 511 9

Angel vs. Bullington, 330 U. S. 183 ..... 11, 13, 15

Connell vs. Dulien, 85 So. 2d 3, 351 U.S. 926.... 1, 2, 3, 6, 7

Dulien vs. Connell, 240 F. 2d 414 ..... 2, 7

Dulien vs. Connell, 252 F. 2d 556 ..... 2, 8

Grubb vs. Public Utilities Commission, 281 U. S. 470 15

Hill vs. Martin, 296 U. S. 393, 403 9

In re Innis, 140 F. 2d 479 14

Marine Insurance Co. vs. Hodgson, 7 Cranch 332 14

Oklahoma Packing Co. vs. Oklahoma Gas and Electric Co., 309 U. S. 4, 9..... 9

Parmacher vs. Mount, 207 F. 2d 788, 791 10

Partmar Corporation vs. Paramount Pictures, 347 U. S. 89 15

Peck vs. Jenness, 48 U. S. 612, 624 9

Southern Railway vs. Painter, 314 U.S. 155..... 10

Rules of this Court

Rule 56 (4) 3, 4, 13, 17

Statutes

28 U.S.C. 1254(1) 2

28 U.S.C. 1651 9

28 U.S.C. 2283 ..... 2, 3, 8, 9, 10,17

Texts

Moore, Federal Practice, Volume 7, page 626 12

Moore, Federal Practice, Volume 7, page 634 13

Moore, Federal Rules and Official Forms, 1956, page 330 10

Pommeroy, Equity Jurisprudence, Section 1361 A 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 946

DULIEN STEEL PRODUCTS, INC.

Petitioner

vs.

ELBERT B. CONNELL,

Respondent

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Elbert B. Connell prays that this Honorable Court refuse to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court entered on February 28, 1958.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana which is sought to be reviewed by the whole federal court proceeding is *Elbert B. Connell vs. Dulien Steel Products, Inc.*, 85 So. 2d 3, certiorari denied, 351 U.S. 926, Case No. 805, October term 1955.

The original opinion of the United States District Court for the Western District of Louisiana is in the record at pages 82-107, otherwise unreported.

The opinion of the United States Court of Appeals for the Fifth Circuit on the first appeal is found at 240 F. 2d 414.

The opinion of the District Court after remand from the Court of Appeals is in the record at pages 13-20, otherwise unreported.

The opinion of the Court of Appeals that is sought to be reviewed on certiorari is found at 252 F. 2d 556. This was the second federal appeal in this case.

JURISDICTION

Petitioner seeks jurisdiction under 28 U.S.C. 1254(1). Respondent denies there is any jurisdiction to review this case because:

1. This is an action to enjoin the enforcement of a state court judgment. It is unquestioned that the state court had jurisdiction of the parties and the subject matter and that the judgment was responsive to the pleadings. Under such circumstances the prohibition found at 28 U.S.C. 2283 is fundamental and the same denies jurisdiction to the Federal Courts for such injunctive action.

2. This Honorable Court has already denied certiorari in this cause on a previous occasion. At that time Dulien presented the same arguments regarding quantum and sought the same relief as it now seeks. 351 U.S. 926.

3. Dulien has waived any right which it might have for certiorari by acquiescing in the judgment of the United States Court of Appeals.

STATUTE INVOLVED

Petitioner has failed to set forth any constitutional provision, treaty, statute, ordinance or regulation which the case involves. Petitioner cannot cite such for there are no such provisions that give authority to federal courts to review or annul the final judgments of state courts. This is especially true where such final judgment has already been considered by this court on denial of application for certiorari as in the case at bar. 351 U.S. 926.

The most pertinent statute is one that takes jurisdiction away from federal courts;

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction or to protect or effectuate its judgments." 28 U.S.C. 2283.

Petitioner has failed to cite any authority which would bring the case at bar within any recognized exception to the above prohibition.

Rule 56 (4) of this court is applicable:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

QUESTIONS PRESENTED

Dulien has listed three questions, but they all can be summarized and clarified as follows: *Do the federal courts have the power to review, modify or annul a final judgment of the Louisiana Supreme Court on the ground that the same is erroneous?* Of course, we admit that in proper cases this court has the power on writ of certiorari to such court, but after this court denies such a writ, can the applicant move into the lower federal courts to accomplish the same thing?

If the above question is answered in the affirmative, then the additional question; which law controls, federal or state, becomes important.

Though not at first blush apparent, another question presented is *whether a litigant is at liberty to assert a defense by piecemeal, presenting a part only of the available defenses, reserving others for a separate suit if the ones presented are unsuccessful.*

Still another question is whether the court should grant certiorari in a case where it is doubtful that the applicant would prevail because of other legal questions not mentioned in the Court of Appeals opinion, but which were considered by the district court and which were fully presented, briefed and argued at all stages of the proceeding.

Of course, the vital matter of jurisdiction is always presented.

Respondent presents the question of whether there is ground for the writ in question so as to justify the imposition of damages by the court pursuant to rule 56 (4).

STATEMENT OF THE CASE

A statement of the whole case, including the original state court action is quite necessary to understand this somewhat complicated situation.

In 1952 Connell sued Dulien in the Louisiana State Court system under the wage and hour provisions of the Fair Labor Standards Act. Dulien admitted employment and coverage, basing its defense entirely on a novel factual question, in effect as follows: Connell (a night watchman) was only required to be present during the actual time necessary to make a round of the watchman's station clocks (about 45 minutes for each round); that he had to do this only five times a night; that he was not employed or on duty in between these rounds (though he was actually physically present); that he only worked four or five hours each night (stipulated to be 30 hours per week—Record in case 805, October term 1955, page 141); that he was never told he would have to stay on the premises between rounds; that he had been paid for his 30 hours per week and thus was not due any additional sums.

The trial judge found for Connell and in regard to quantum, stated,

> ". . . if counsel for plaintiff and defendant cannot agree on the amount I will pass on that at a later date, after having received a brief on that question alone." (R. 134)

On the previous application to this court for certiorari in May of 1956 we stated on page 6 of our brief: "Pursuant to his suggestions counsel for plaintiff and

counsel for defendant got together, *and after some measure of disagreement*, finally agreed between themselves as to the proper amount to be awarded." The record at that time did not, of course, show the measure of disagreement, but this record is not so deficient and we pause to consider this for a moment.

Attached to Dulien's first petition in the federal courts are found exhibits A, B, B-1, and C which show some of the negotiations. (R. 61-68, 135-137) It should be noted at this time that the very computation now urged by Dulien was advanced at that time, exhibit B-1. (R. 67-68) This was voluntarily abandoned by Dulien in 1954 only to be resurrected after all other defenses had failed and the judgment had become final.

From the decision of the state court Dulien appealed and presented to the Louisiana Supreme Court the same issues presented in the trial court, stipulating in oral argument that the amount was not in dispute, which stipulation was recognized by the court in its opinion:

> "Counsel have entered into an agreement that the amount awarded by the district court is correct if the plaintiff was required under his employment to remain on the premises overnight." 85 So. 2d 3.

Dulien thus again deliberately waived any arguments on quantum, although they were in possession of the computation they now contend is the correct one. Exhibit B-1 (R. 67-68).

Rehearing was denied and a later motion to remand for a recomputation of the quantum was also denied. This

was the very first time there was any dispute presented to the courts on the issue of quantum, even though all of these basic facts had been in Dulien's possession all along.

Dulien then applied to this court for certiorari, the issue of quantum being the one urged by them. Certiorari was denied May 7th, 1956, 351 U.S. 926.

The following day Dulien filed the present suit in the United States District Court for the Western District of Louisiana (R. 53 et seq), asserting jurisdiction in diversity and praying for a temporary and permanent injunction against the enforcement of the state court judgment. Connell filed motions to dismiss based upon jurisdiction, res judicata and failure to state a claim. (R. 71-72). The district court granted a restraint against enforcement of the state court judgment which by its terms did not expire within ten days. (R. 116-117) Connell filed a motion to dismiss and for summary judgment and when no action was taken thereon, appealed. The United States Court of Appeals dismissed the appeal as premature, but discussed the case in some detail. 240 F. 2d 414. Rehearing was denied February 13, 1957. Six weeks later the district court held a hearing at Dulien's instance and at that time dismissed the complaint and granted summary judgment for Connell. The opinion of the district court is well reasoned and discusses many of the aspects of the case. It is found at page 13-30 of the record. It shows why, even if the reasons given by the Court of Appeals are not correct, the complaint should nevertheless fail.

Dulien took an appeal. The United States Court of Appeals affirmed, but on different grounds than that given by the district judge. 252 F. 2d 556. Rehearing was denied March 27, 1958.

On *April 7, 1958*, Dulien went back to the Louisiana State Court System and filed in the original trial court a petition to set aside the original state court judgment. Included in the allegations of that petition are the following:

> "18. That, in accordance with Connell's arguments, the United States Fifth Circuit Court of Appeals on March 27, 1958 upheld the plea of lack of jurisdiction.
>
> "19. That, based upon such ruling and upon contention of Connell that this Honorable Court is the only court having proper jurisdiction, the aforementioned pleadings are here presented; . . ."

A full faith and credit certified copy of said pleadings have been forwarded to the Clerk of this Court for inclusion in the record of this case.

On *April 23, 1958*, the present petition for certiorari was filed.

ARGUMENT

There is no jurisdiction in the Federal Court System to enjoin state court proceedings because of the prohibition found at 28 U.S.C. 2283

The above statute is set forth in full hereinabove, page 3. It is well settled that the prohibition is to the result rather than the manner of obtaining that result, that is, the rule cannot be circumvented by directing the

injunction to the parties rather than to the state court. *Oklahoma Packing Co. vs. Oklahoma Gas and Electric Co.*, 309 U. S. 49; *Peck vs. Jenness*, 48 U.S. 612, 624. It is likewise well settled that the term proceeding includes proceedings in execution of any judgment obtained in the state court. *Hill vs. Martin*, 296 U.S. 393, 403.

In the case at bar there is certainly no express act of congress, nor is there a federal judgment to protect or effectuate. The phrase, "in aid of its jurisdiction" according to the revisors notes to section 2283, was added to conform to section 1651 (the all writs section) of title 28 and to make clear the recognized power of the Federal Courts to stay proceedings in state cases removed to the District Court.

The cases support this view, the most recent being *Amalgamated Clothing Workers of America vs. Richmond Brothers*, 348 U. S. 511. There, this court said:

> "A district court's assertion of equity power or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties."

The above statement is almost prophetic. Here Dulien seeks to enjoin the enforcement of a state court judgment, affirmed on appeal to the highest state court and in which this court has already denied certiorari. This case has been in the courts for over six years and for the past two years the element of federal-state competition has been exploited so as to complicate matters and to frustrate the execution of a state court judgment obtained

in a case where there has never been any question of jurisdiction over subject matter or parties and where the judgment was responsive to the pleadings originally presented.

This doctrine is not new, even though Professor William Moore has only recently become reconciled to it. See *Moore's Federal Rules and Official Forms, 1956, page 330*, where he now recognizes, as the result of the Amalgamated case, supra, that section 2283 is to be read literally and against federal power. In Amalgamated this court refused to enjoin even where it was apparently admitted that the state court had no jurisdiction in the premises. A fortiorari, when the state court has acted within the bounds of its jurisdiction, the same result should apply.

For years this court has applied similar rules. Where litigation ran the gamut in the state courts this court has clearly stated that the ultimate vindication of federal rights lies with this court, not with any other court, solely and exclusively—by appeal or certiorari but not by new action in the lower federal courts. *Southern Railway vs. Pointer*, 314 U. S. 155. In *Parnocher vs. Mount*, 207 F. 2d 788, 791, it was said:

> "Even though a question of Federal law is presented in a case in a state court if the court has jurisdiction of the subject matter and of the parties and after hearing enters a judgment which is responsive to the issues and the judgment is affirmed by the highest court of the state, no court of the United States other than the Supreme Court on appeal or certiorari has jurisdiction to review, vacate or annul such judgment. Even though it is contended such a judgment involves a denial of federal rights, the

> question cannot be reviewed in the courts of the United States except on appeal or certiorari to the Supreme Court. Angel vs. Bullington, 330 U.S. 183."

And, in *Angel vs. Bullington*, supra, this court said:

> When an asserted federal right is denied, the sufficiency of the denial is for this court to decide. (he) could have come here, not merely by the grace of this court on certiorari, but on appeal . . .
> *He cannot begin all over again in an action involving the same issues before another forum in the same state.*" (Emphasis ours)

The district court was striving for the same thing when the plea of res judicata was sustained, for, once again, as this court said in *Angel vs. Bullington*, supra,

> "If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation in this way. The doctrine of res judicata is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if by fair process a controversy has once gone through the courts to conclusion . . . and it has gone through if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

That the question of quantum was involved, or could have been involved is abundantly clear from the record. The state trial judge stated he would pass on quantum after receiving a brief on that subject alone (R. 131-134). Dulien filed a motion for hearing as to quantum (R. 135-136). The judgment and stipulation of counsel show the

same (R. 137-138). *Exhibits B and B-1, attached to Dulien's original petition in the federal courts clearly show that they were well acquainted with the now asserted method of computation well before the initial judgment was obtained. (R. 62-64, 67-68) and by deliberate choice, did not argue the point.*

The Court of Appeals was right in its determination of the state law.

The opinion of the United States Court of Appeals for the Fifth Circuit is so direct and to the point that it would be difficult to add anything to it. Dulien in brief does not even make the contention that the court's interpretation of the Louisiana Law is erroneous. That state law is controlling is clear from the opinion. It is reinforced by the opinions of the legal writers. We are not cited to any federal law that would allow the right sought to be asserted by Dulien, even under the completely unwarranted assumption that their allegations are true.

> "Erie Tompkins dispelled the notion of a federal general common law. State law must, then, determine whether the party seeking relief has an equitable cause of action, and this is true whether the judgment under attack was rendered in an action involving state law or federal law, for the claim is merged into the judgment; and an action to obtain relief from that judgment involves a different claim, which does not involve a federal matter." 7 Moore, Federal Practice, 626.

The Court of Appeals reached the same and identical conclusion in language so clear as to be almost startling. It was a correct conclusion.

"We believe it is logical and practical to hold that state law prescribes the basis for the additional remedial attack on the judgment through the independent action as a facet of its general power to determine the res judicata effect of its judgments." 7 Moore, Federal Practice, 634.

This Court Has Already Denied the Relief Dulien Here Seeks

Dulien presented to the Louisiana Supreme Court in January 1956 a motion to remand the case for recomputation of the quantum. On denial Dulien sought certiorari on the issue of quantum. It was for "this court to decide" whether the denial was sufficient or not. Angel vs. Bullington, supra. In May, 1956 this court denied certiorari, thus deciding the matter and terminating the litigation. Dulien should not be at liberty thereby to start on the long march to again knock at these portals via the federal court system. Dulien has tried it, though. To permit it would be to invite a multiplicity of litigation such as this court has never seen. A denial of certiorari should serve as something more than an open invitation to start all over again, especially when the grounds urged were available and known to complainant at all times. See exhibits B and B-1 annexed to Dulien's original complaint. (R. 62-64, 67-68) This alone should be sufficient for the imposition of damages pursuant to Rule 56(4).

Dulien Has Waived Its Rights For Certiorari by Acquiescence in the Judgement

Sixteen days before this application for certiorari was filed Dulien instituted an action in the state district court that heard the case originally, and in that action

specifically recognized and acquiesced in the opinion of the Court of Appeals. In article 19 of that petition (supra, pg. 8) they declared that the action was being taken based upon the ruling of the Court of Appeals. It is a fundamental proposition that acquiescence in a decision destroys the right to further review of the same.

OTHER REASONS

There are a number of other reasons why Dulien's complaint would not be successful other than those mentioned by the United States Court of Appeals for the Fifth Circuit. These are touched upon by the opinion in the United States District Court for the Western District of Louisiana (R. 13-20) and more fully set forth in our brief in the second appeal, apparently in the record, but we have been unable to determine at just what pages. Briefly they concern the fact that a proper case in equity was never presented to the federal courts for two reasons:

1. Dulien asks the aid of an equity tribunal for relief from a judgment on account of a defense, which if good anywhere was good at law, and which they were not prevented from using at law, either by any act of Connell, or by any lack of ability on their own part. *Marine Insurance Company vs. Hodgson*, 7 Cranch 332; *In re Innis*, 140 F. 2d 479; *Pommeroy, Equity Jurisprudence*, Section 1361 A.

2. In Dulien's original petition (R-57), allegation 8, we see that under the calculation now urged by it the hourly rate of Mr. Connell would have been only 61 cents per hour rather than $1.72 as used. Thus Dulien pleads before an equity tribunal, in mitigation of damages, that in addition to violating

> Section 7A of the Act, they also violated Section 6A1. This violates the "clean hands" doctrine and removes the case from equitable considerations, if indeed any ever existed.

There is also the matter of the plea of Res Judicata, partly presented hereinabove, but also based on such cases as *Partmar Corporation vs. Paramount Pictures*, 347 U.S. 89, *Grubb vs. Public Utilities Commission*, 281 U.S. 470 and *Angel vs. Bullington*, 330 U.S. 183.

An additional matter is whether the error, if any, was only an error of law for which no relief might be granted; the matter of a compromise agreement and several other matters not presented but which would have to be argued on the merits should this case ever be tried. They are mentioned briefly in our previous certiorari opposition and need not be detailed here.

And, of course, Dulien's allegations are not true in the first place, as the record will reveal and as detailed hereinbefore and hereinafter.

DAMAGES FOR RESPONDENT'S DELAY

Because there is so very little ground for the issuance of the writ of certiorari in this case, respondent feels that he should be granted damages for the delay occasioned by this application. In a similar case in the past, *Grubb vs. Public Utilities Commission*, 281 U.S. 470, the court, after granting the writ of certiorari and then discovering that, as in the case at bar, the matters sought to be raised had been raised, or at least were available to be raised in an earlier proceeding, granted a motion to dismiss without awaiting oral argument, saying:

> "It was incumbent on the appellant to present in support of his asserted right of attack, every available ground of which he had knowledge. He was not at liberty to prosecute that right by piece meal or by presenting a part only of the available grounds and reserving others for another suit if failing in that. (citations)
>
> "As the ground just described was available but not put forward, the appellant must abide by the rule that a judgment upon the merits in one suit is res judicata in another where the parties and the subject matter are the same. Not only as respects matters actually presented to sustain or defeat the right, but also as respects any other available matter which might have been presented to that end. (citations)
>
> "We think it follows from what has been said . . . that the objections . . . . are so unsubstantial that the motion to affirm without waiting oral argument should be sustained."

The court further made the observation:

> "The case in the state court was so far identical with the suit in the Federal Court as respects subject matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity operated to bar the further prosecution of the latter."

It only remains for us to show that the issue of quantum, which Dulien wishes to re-litigate in the federal courts was available at all times to them in the state proceeding. The United States District Judge recognized that such was the case when he stated in his opinion:

> "It is noted that the question was one which was available to defendant to litigate but by deliberate choice of able counsel it did not do so and we think its mouth is forever closed to contest the propriety or validity of the judgment entered upon the stipulation." (R. 70)

The correspondence found attached to Dulien's original petition as exhibits A, B, B-1, and C (R. 62-68), as well as the motion for a hearing on quantum (R. 135-136) conclusively fortify the District Judge on that point.

If a matter is so unsubstantial as to justify summary dismissal without awaiting oral argument, it is unsubstantial enough to justify the imposition of damages for the delay, pursuant to rule 56 (4).

CONCLUSION

The federal courts are without jurisdiction for the following reasons:

1. The prohibition of 28 U.S.C. 2283.
2. The petition seeks in a diversity case, relief not allowed by the state law of the situs.
3. Certiorari has already been sought and denied once on this claim.
4. Dulien has waived any right to certiorari by acquiescence in the judgment.

A proper case in equity was not presented for the following reasons:

1. The petition does not set out or detail any reason why this defense was not exerted in the first place, even though the same was within the knowledge of Dulien at that time.

2. The complaint, though seeking equitable relief, clearly shows that the basis for this relief is a further violation of the Fair Labor Standards Act.

The claim is res judicata for the following reasons:

1. The defense urged has at all times been available to Dulien.

2. The State Court had jurisdiction of the subject matter and of the parties and entered a judgment which was responsive to the pleadings.

No error was made.

Any error which might have been committed was not mutual nor was it any more than an error of law for which no relief is permitted.

The quantum in the state court judgment resulted from a compromise.

The points presented are so unsubstantial as to justify the imposition of damages in favor of respondent.

The petition for certiorari should be denied, and damages should be awarded Respondent for the delay occasioned by these proceedings.

Respectfully submitted,

MECOM, SCOTT & DESPOT
Attorneys for Elbert B. Connell

By:

Philip H. Mecom

I hereby certify that a copy of this brief has been served upon opposing counsel herein by depositing a copy in the United States Mail, properly addressed on this the ..... day of May, 1958.

.....

Philip H. Mecom